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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, N.W.
Room TW-B204
Washington, D.C 20554

Dear Ms. Dortch

Re: Ex Parte Submission In IB Docket Nos. 02-324 & 96-261

On behalf of the Caribbean Association of National Telecommunication Organizations ("CANTO"), and further to CANTO's previous letters in these dockets dated May 12, 2003 and August 11, 2003, I am submitting this letter to address the possible promulgation by the Commission of a further notice of proposed rulemaking in the above-captioned proceedings regarding the modification of the current settlement rate benchmark policy that the Commission established in *International Settlement Rates*, 12 FCC Rcd 19806 (1997). In this letter, CANTO provides an initial response to the informal proposal of AT&T Corporation ("AT&T") on October 22, 2003 that the Commission commence a rulemaking to implement severe reductions in the current benchmark rates. *See* Letter from D Schoenberger, AT&T Corporation, to M. Dortch, FCC (Oct. 22, 2003).

CANTO submits that it would be premature and unwise for the Commission to commence a generic rulemaking at this time to modify its benchmark policy. The Commission's initial benchmark policy imposed significant revenue reductions on numerous foreign telecommunications carriers. In some cases, these reductions were implemented quite recently – effective January 1, 2003 for low-teledensity countries, and January 1, 2002 for low-income countries. In many countries, carriers have not had sufficient time to adjust to these unilateral revenue reductions, and the necessary rate rebalancing by foreign National Regulatory Authorities ("NRAs") to ensure economically rational rate structures and levels has not yet occurred. In addition, a new rulemaking would create business uncertainty and regulatory confusion in an industry that has not yet fully recovered from the significant sector turmoil of the last several years. Rather than intervene unilaterally in the telecommunications marketplace for a second time in seven years, CANTO urges the Commission to

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permit marketplace and technological forces, as well as multilateral institutions and processes and the ongoing efforts of foreign NRAs, to continue to address any perceived issues regarding foreign termination rates.

In the event the Commission nevertheless decides to move forward with a further rulemaking, CANTO urges the Commission to ensure that such rulemaking is comprehensive, fair and balanced. Particularly given concerns by foreign telecommunications carriers and NRAs that the Commission does not speak for the global community, and may be subject to parochial pressures from U.S. carriers to adopt rules and policies that benefit U.S. carriers at the expense of foreign carriers and consumers, CANTO urges the Commission to make certain that any further rulemaking notice fully contemplates the implications of further benchmark reforms.

The following is a non-exhaustive list of issues that, in CANTO's view, the Commission should take into consideration in any further rulemaking notice:

1. In general, the Commission should examine whether unilateral intervention in the global telecommunications marketplace regarding through settlement rate benchmarks is consistent with the WTO Basic Telecommunications Agreement, including the Reference Paper. Among other issues, the Commission should examine whether such action comports fully with the GATS National Treatment principle. In addition, the Commission should consider whether unilateral intervention would interfere with a foreign NRA's right, pursuant to section 3 of the Reference Paper, to "define the kind of universal service obligation it wishes to maintain." The Commission also should consider whether further reductions in benchmark rates comport with the requirement in section 5 that "decisions . . . shall be impartial with respect to all market participants" when the Commission lacks sufficient data on foreign markets and conditions to make fully-informed judgments on just and reasonable foreign termination rates. The Commission also should consider whether the current policy of symmetrical settlement rates on routes subject to the International Settlements Policy are consistent with "cost-oriented" pricing given the lower termination costs on the U.S. end.

2. The Commission should examine whether it has sufficient authority under the Communications Act of 1934 to prescribe termination rates that are or may be inconsistent with the laws, regulations, policies and/or orders of foreign governments and NRAs. As CANTO mentioned in its May 12, 2003 letter (at p. 2), the court decision upholding the Commission's initial benchmark policy did not address whether the Commission may take actions which create conflicts with

foreign laws and regulations. On a related point, the Commission should consider whether, consistent with established notions of international comity and the procedures and requirements of multilateral institutions such as the WTO, the OECD and the ITU, it is appropriate for the Commission to engage in further unilateral intervention in the global telecommunications marketplace. In addition, the Commission should consider not only possible reductions in benchmark rates, but also the elimination of the current benchmark policy altogether.

3. The Commission should analyze whether 47 U.S.C. §§ 151, 201(b) & 205 focus solely on the goal of reducing foreign termination rates to their lowest possible levels, or whether those provisions take into account a broader range of public policy goals, including the need to promote the quality of international telecommunications services (*e.g.*, call completion ratios) for the benefit of U.S. consumers. In addition, the Commission should take into account the extent to which benchmark reductions will harm the interests of U.S. consumers by undermining foreign universal service and infrastructure build-out programs. CANTO would note that the Commission has recognized in other contexts that rates should be established to provide sufficient incentives for carriers to make investments in new infrastructure and to upgrade existing infrastructure. In that regard, the Commission should examine whether it has sufficient data to take fully into account all relevant factors involved in establishing "just and reasonable" rates and, if not, whether it should rely instead upon multilateral institutions and foreign NRAs to address issues regarding foreign termination rates.

4 The Commission should conduct a *de novo* examination whether a long run incremental cost ("LRIC") methodology is the necessary or proper yardstick for measuring "just and reasonable" rates pursuant to 47 U.S.C. §§ 201 & 205. For example, in its recent *Triennial Review Order*, the Commission determined that the so-called TELRIC methodology -- a LRIC-based pricing standard for interconnection, unbundled network elements and collocation under Sections 251 and 252 of the Communications Act of 1934 – would not necessarily be the appropriate pricing standard when an incumbent local exchange carrier provides network functionalities solely pursuant to Section 271. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶656-57 (2003). As another example, certain U.S. carriers have complained that TELRIC rates are non-compensatory, and the Commission has commenced a rulemaking proceeding (WC Docket No. 03-173) to determine whether the TELRIC rules should be modified. In general, CANTO submits that the Commission should strive to make certain that its approach to "just and reasonable" rates in the benchmark context is fully consistent with its approach to "just and reasonable" rates in other contexts.

5. The Commission should closely examine whether it is necessary for the Commission to intervene unilaterally in the international telecommunications marketplace, or whether it can and should rely, as contemplated by applicable international treaty principles, upon commercial negotiations between correspondent telecommunications carriers. Current market and technological developments, including but not limited to accelerating competitive entry and liberalization in foreign markets, as well as hubbing, third-country routing (*refile*) and Voice Over Internet Protocol ("VOIP"), are imposing significant downward pressure on foreign termination rates in many countries. At the same time, foreign NRAs are actively addressing these issues and in some cases have prescribed termination rates, particularly for traffic terminating on foreign mobile networks. Given that the interests of U.S. consumers are identical to the interests of certain foreign consumers regarding the level of termination rates, the Commission should consider whether unilateral action can be avoided because it is not necessary to ensure just and reasonable termination rates. Moreover, the Commission should consider whether generic action through benchmark modifications is unnecessary because the Commission can address adequately any perceived problems with foreign termination rates through discrete enforcement actions directed at specific foreign carriers and countries.

6. The Commission should examine whether reductions in benchmark rates will achieve the desired result of lowering the termination costs of U.S. international carriers and contributing to lower calling rates for U.S. consumers. This examination should consider, among other things, whether benchmark reductions will create an incentive for some foreign carriers to terminate direct relations with U.S. international carriers, thereby leading to the inefficient use of existing facilities. Given the substantial excess wholesale capacity available in the industry today, the option of bypassing direct relations with U.S. carriers may be more feasible now for some carriers than in 1997 when the Commission promulgated the current benchmark policy. The Commission also should consider whether modifications to its benchmark policies will lead to or cause service disruptions. As one example, traffic destined for a foreign mobile network may be delivered initially to an intermediate foreign carrier, which then hands-off the traffic to the foreign mobile carrier for termination. If a reduced benchmark rate results in the intermediate foreign carrier receiving insufficient funds to pay the mobile termination rate, it is possible if not likely that the intermediate foreign carrier will refuse to provide this function at a loss, thereby resulting in a disruption in service for U.S. subscribers.

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7. The Commission should thoroughly examine any proposed use of the Tariff Component Pricing ("TCP") model to establish new benchmark rates. In particular, the Commission should analyze whether the inherent and substantial imprecision in this model makes it unsuitable for benchmark reductions, especially for telecommunications carriers in developing countries. It is one thing to use such an imprecise methodology when the prescribed rates are clearly and substantially above cost. It is another thing to use this methodology to establish rates, as AT&T has suggested, that are intended to mirror cost-oriented rates without any material buffer zone. Using the inaccurate and unscientific TCP methodology to impose further benchmark reductions presents an unacceptable risk that the prescribed rates will be below-cost for one or more foreign telecommunications carriers. The Commission also should analyze whether alternative methodologies are preferable to the TCP methodology, and whether it is possible to obtain actual cost data to displace, in whole or in part, the proxy approach embodied in the TCP methodology.

8. The Commission should take into account that the TCP methodology, as revised by AT&T, fails to account for numerous relevant costs incurred by foreign telecommunications carriers, especially in less developed countries. For example, AT&T has ignored the costs incurred by foreign telecommunications carriers when U.S. carriers fail to make settlement payments, which has become an increasing problem with small, start-up U.S. international carriers in recent years. Further, the largest U.S. international carriers often withhold settlement payments or delay such payments well beyond their due date, thereby imposing significant costs on foreign carriers. AT&T has ignored other costs, including mandatory universal service charges (*e.g.*, access deficit charges) imposed by foreign regulators. AT&T also has ignored the higher costs incurred by carriers in less developed countries, including but not limited to a higher cost of capital; a higher political and country risk profile, exchange rate fluctuations; higher purchase, shipping and installation costs for equipment; higher inventory and maintenance costs; higher insurance costs; higher costs due to adverse terrain and climactic conditions; higher costs due to a smaller and less dense population; higher costs due to a less efficient and lower density network configuration; higher costs due to fewer economies of scale/scope; higher costs due to a less educated and skilled domestic workforce; and so on. The Commission also should examine whether AT&T's suggestion that benchmark rates should be reduced based on some estimate of avoided costs embodies a top-down methodology that is fundamentally inconsistent with the bottom-up TCP model.

9. The Commission also should closely analyze whether the TCP methodology, as articulated and applied by AT&T, employs inaccurate or improper inputs. In particular, AT&T has chosen to use international and domestic private line rates as proxies for certain transmission costs. As AT&T knows, those retail services often recover few or none of the foreign carrier's joint and common costs, particularly in less developed countries where they may be provided to only a few large customers. Benchmark rates developed from those proxies would not reflect a fair loading of the foreign carrier's joint and common costs. The Commission has emphasized in the past that cost-oriented rates should make "a reasonable contribution to joint and common costs." *E.g., International Settlement Rates*, 12 FCC Rcd 19806, ¶40 (1997). Similarly, these TCP proxies rely upon below-cost (*i.e.*, subsidized) rates in foreign countries, thereby eliminating their probative value as independent cost proxies.

10. In general, the Commission should independently inquire as to the relevant costs that any benchmark rate should reasonably be expected to recover. In particular, the Commission should inquire whether mobile termination rates in countries with a calling party pays ("CPP") regime are intended to recover a broader range of retail, wholesale and other costs than is currently reflected in the TCP model. Further, the Commission should examine whether, consistent with section 3 of the WTO Reference Paper, it is permissible for a foreign government or regulator to require that termination rates for traffic terminating on landline networks should recover a broader range of costs than those currently reflected in the TCP model.

11. The Commission should undertake an independent inquiry into the proper level of foreign universal service support that reasonably can and should be reflected in foreign termination rates. This inquiry should take into account section 3 of the WTO Reference Paper, which entitles each WTO Member to "define the kind of universal service obligation it wishes to maintain." CANTO also submits that the Commission must carefully examine whether, compared to the foreign NRA, the Commission has the sufficient data and authority necessary to determine the appropriate level of foreign universal service support to be derived from foreign termination rates.

12. The Commission should thoroughly examine the impact of its pre-existing benchmark policies on foreign carriers and foreign consumers, particularly their universal service programs, calling rates, and infrastructure development initiatives. In addition, the Commission should thoroughly examine the likely impact of any reductions in the benchmark rates on foreign carriers and consumers, focusing particularly upon revenue losses for foreign carriers, the

extent to which such losses will undermine universal service programs and infrastructure development, and the impact on foreign retail rates (local, domestic and international) as well as the level of subscribership in foreign countries.

13. CANTO submits that the Commission must take a hard look at its existing benchmark policy to determine whether U.S. carriers have passed-through termination cost reductions to all classes of U.S. callers in the form of lower calling rates on a route-by-route basis. As CANTO indicated in its May 12, 2003 letter (at pp. 3-4), the major U.S. international carriers have not passed-through termination cost reductions to U.S. subscribers who wish to call CANTO member countries, but rather such carriers have retained some or all of the cost reductions as economic rents. The Commission made a commitment when it established the benchmark policy that it would monitor the pricing behavior of U.S. international carriers and take appropriate actions if termination cost reductions were not being passed through on a route-by-route basis. *See International Settlement Rates*, 12 FCC Rcd 19806, ¶272 (1997). The Commission should consider whether to require U.S. international carriers to pass-through all termination cost reductions to U.S. subscribers through lower calling rates The Commission also should investigate the harm that U.S. international carriers have inflicted upon foreign carriers and consumers through excessive U S. calling rates, which have artificially depressed U.S. demand and reduced the termination revenues earned by foreign telecommunications carriers.

14. The record in this proceeding contains substantial evidence that U.S. international carriers have marked-up foreign mobile termination rates in the retail surcharges they impose directly on U S consumers. The Commission should conduct a full investigation and take all appropriate actions to stop and remedy this abusive practice by U.S. carriers. In particular, the Commission should consider adopting a rule prohibiting U.S. carriers from marking-up foreign mobile surcharges in the same way that the Commission has prohibited U.S. domestic carriers from marking-up universal service line-items imposed on U.S. subscribers. *See In the Matter of Federal-State Joint Board on Universal Service*, 17 FCC Rcd 24952 (2002).

15 The Commission should consider the view of some foreign telecommunications carriers that the standard for granting waivers of the benchmark policy articulated in *International Settlement Rates*, 12 FCC Rcd 19806, ¶174 (1997), is unduly severe and, as a practical matter, virtually impossible for any foreign carrier to meet. CANTO would note that the Commission has not granted even one waiver in the more than six years since the benchmark policy was established. CANTO submits that the Commission should consider establishing a more reasonable standard that ensures waivers will be

granted in a timely fashion when a foreign telecommunications carrier can demonstrate that application of the benchmark rate would cause hardship to the foreign carrier or foreign consumers.

16. CANTO requests that the Commission consider whether to create an exemption from the benchmark reductions, or benchmark rates entirely, for insular foreign carriers in rural or high-cost countries. Section 251(f) of the Communications Act of 1934 establishes an exemption from certain mandatory obligations, including TELRIC pricing, for so-called rural telephone companies, which are defined, among other things, to be local exchange carriers serving fewer than 100,000 access lines. *See* 47 U.S.C. §§ 153(37) & 251(f). The Commission should consider establishing a similar exemption from benchmark rates for any foreign carrier serving fewer than 100,000 access lines or otherwise qualifying as a rural telephone company In general, the Commission should strive to ensure that its treatment of foreign carriers under the benchmark regime is fully consistent with the domestic regimes applicable to rural and high-cost providers of telecommunications services.

17. The Commission should consider whether to establish certain criteria for the automatic exclusion of specific routes from the benchmark regime. For example, in its recent *Triennial Review Order*, the Commission established specific "triggers" whereby a network element will be exempted from mandatory unbundling in the event there is evidence that a requesting carrier can feasibly self-provide the network element or obtain it on a wholesale basis from other carriers. *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 328-40; 394-418; 498-524 (2003). In other contexts, the Commission has established specific criteria whereby incumbent carriers achieve pricing flexibility after a certain showing is made. Consistent with these and other precedents, CANTO submits that the benchmark regime should cease to apply on any route where it is possible for a U.S. international carrier to establish its own international gateway to terminate international traffic. If U.S. international carriers prefer to terminate traffic at benchmark rates rather than establish their own gateways where such is permitted, it is strong evidence that the benchmark rates are artificially low. Further, the Commission should consider whether to remove the benchmark regime entirely on routes where there are two or more existing unaffiliated carriers that have, or could obtain, the necessary authority to operate international gateways for the termination of international telecommunications traffic.

18. CANTO requests that the Commission address and clarify the types and nature of telecommunications traffic that is subject to the benchmark regime. As one example, the Commission should address whether international switched traffic that is carried as VOIP is subject to the benchmark regime, and the

Commission should make certain that its treatment of international VOIP traffic for benchmark purposes is fully consistent with its treatment of domestic VOIP traffic for regulatory purposes. More broadly, the Commission should address whether and how the benchmark regime applies to traffic routed via the public Internet as well as private IP networks.

19. The Commission also should examine whether the focus of the current benchmark regime on notional termination rates is misplaced. Because settlements are paid under the traditional system only on a traffic imbalance on a route, the actual or effective settlement rate often is significantly lower than the notional settlement rate on the route. A high termination rate may cause no harm to U.S. carriers or U.S. consumers if the effective termination rate is much lower, especially since U.S carriers establish prices based on effective rather than notional settlement rates. In general, the Commission should analyze whether a benchmark regime focused on notional settlement rates has a sufficient nexus with its public policy goals in situations where effective termination rates are much lower.

Yours Respectfully

Selby Wilson
Secretary General